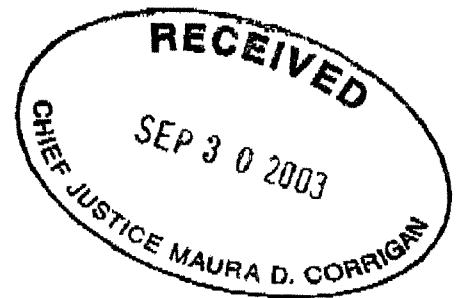




The Circuit Court
for the Sixth Judicial Court of Michigan
COURTHOUSE TOWER
PONTIAC, MICHIGAN 48341-0404



MICHAEL WARREN
CIRCUIT JUDGE

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September 25, 2003

Maura D. Corrigan, Chief Justice
Michigan Supreme Court
Cadillac Place
3034 West Grand Blvd. Ste. 8-500
Detroit, MI 48202-6034

Dear Chief Justice:

This letter is provided in response to the Court's request for comments pursuant to ADM 2001-51 regarding proposed amendments to MRE 404(b). I have reviewed the Report to the Michigan Supreme Court on Proposed Domestic Violence Amendments to the Rules of Evidence published by the Court's Advisory Committee on the Rules of Evidence, dated April 9, 2003, as well as other resources and cases. Although I strongly affirm that domestic violence and similar matters require a vigorous and innovative response by the courts and our system of justice, I must oppose the proposed amendments to MRE 404(b).

As Justice Thomas M. Cooley wrote in his seminal work, *Constitutional Limitations* (first ed, 1868), p 309:

Perhaps the most important protection to personal liberty consists in the mode of trial which is secured to every person accused of crime. . . . And first, the party must be presumed to be innocent

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until he is proved to be guilty. This is a presumption which attends all the proceedings against him, from their initiation until they result in a verdict, which either finds the party guilty or changes the presumption of innocence into an adjudged fact.

Moreover, a person is entitled to notice, via a complaint or information, of the crimes with which he or she has been charged, MCR 6.101 *et seq.*, and may only be convicted of such charges. Put another way, a defendant is not to be convicted based on his bad character or uncharged, prior misconduct.

Accordingly, by excluding evidence of alleged prior acts that are not otherwise relevant to a trial, MRE 404(b) serves two fundamental maxims of Michigan jurisprudence – maintaining the presumption of innocence and ensuring that a defendant is convicted only of the crimes with which he is charged. Thus, the Court recently explained that the prohibition against the use of prior acts character evidence “is deeply rooted in our jurisprudence. Far from being a mere technicality, the rule ‘reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence.’” *People v Crawford*, 458 Mich 376, 383-384 (1998), quoting *United States v Daniels*, 248 US App DC 198, 205; 770 F2d 1111 (1985). “Underlying the rule is the fear that jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged.” *Id.* at 384.

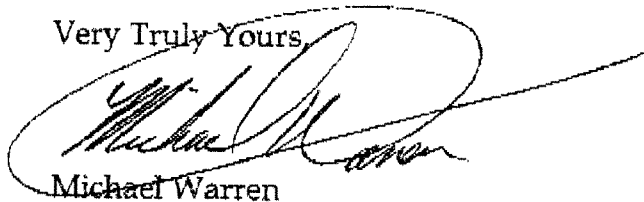
My experience as a trial judge affirms the wisdom of the Court’s reasoning with regard to the underlying purposes of MRE 404(b). As effective advocates for justice, the people often attempt to introduce prior acts evidence in an effort to convince a jury of the defendant’s guilt. Often, such prior acts are relevant to the case and facts at hand, and a cautionary instruction will suffice to ensure that

the evidence is utilized appropriately by the jury. At other times, such evidence has not been offered for a proper purpose, and must be excluded as impermissible propensity or character evidence. Thus, "to ensure the defendant's right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else. The logical relationship between the proffered evidence and the ultimate fact to be proven must be closely scrutinized." *Id.* at 388.

The proposed modification of MRE 404(b), however, would severely constrain the gatekeeping function of the trial courts. Evidence of certain prior acts would be admissible for any relevant purpose, including propensity. Although not technically shifting the burden of proof or adding charges to the information, in practice such a dramatic change would substantially impair the ability of defendants to receive a fair trial. Prosecutors would have the nearly unfettered ability to use prior bad acts in their opening statements and often will be able to introduce such evidence through hearsay exceptions such as excited utterances. In my humble opinion, the proposed amendment would turn topsy-turvy the presumption of innocence and is an affront to well-settled, first principles of American jurisprudence.

Thank you for your consideration.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Michael Warren", is written over a large, loopy flourish that extends to the right. The signature is positioned above the printed name "Michael Warren".

Michael Warren